IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7634 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BASIRBHAI UMARBHAI SHAIKH - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR AR MAJMUDAR for Petitioner(s) : 1,MR NK MAJMUDAR for Petitioner(s) : 1,
Mr. Apoorva Dave, AGP for Respondent(s) : 1,

MR PRANAV V SHAH for Respondent(s) :2 & 3

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 07/12/2006

ORAL JUDGMENT

1. Heard learned Advocate Mr. Nirav K. Majmudar for petitioner, Mr. Dave, learned AGP for respondent NO. 1 and learned Advocate Mr. P.V. Shah for respondent No. 2 and 3. In this matter, affidavit in reply have been filed by respondent no. 3 as well as respondent No. 1 which are on the record of this petition.
2. Rule. Service of rule is waived by Mr. Apoorva Dave, learned AGP on behalf of respondent No.1 and Mr. Pranav V. Shah learned advocate who is appearing for respondents no.2 and 3. In the facts and circumstances of the case and with consent of the learned Advocates for the parties, the matter is taken up for final hearing today.
3. As per the facts of the present case,

petitiner was appointed as Malaria Survelliance Worker on 7.11.1985 in District Panchayat, Ahwa-Dangs where petitioner served as such upto 13.2.1992 and was absent from duty for 13.2.1992 to 6.8.1996 and from August, 1996, petitioner was transferred to from District Panchayat, Ahwa Dangs to District Panchayat Bharuch/Narmada. As per the case of thepetitioner, period of service of service between 13.2.1992 to 6.8.1996 was ordered to be treated as leave without pay by the Panchayat Gram Gruh Nirman and Gram Vikas Vibhag by order dated 8.5.1998 and under the same order, it was also ordered that the period beyond three years of aforesaid period between 1992 to 1996 shall not be considered for pension purpose. It is the case of the petitioner that the petitioner has worked as such in one cadre, one post but in between, pursuant to his request, he was transferred to another district panchayat in the year 1996.

4. By order dated 12.12.2005, benefit of first higher grade was granted to the petitioner on 7th August, 2005 considering nine years service from the date on which petitioner reported in Narmada District Panchayat in the year 1996 but the earlier services rendered by the petitioner was not taken into account while granting benefit of first higher grade as per GR dated 16.8.1994. Therefore, this order dated 12.12.2005 is under challenge in this petition in so far as it relates to denial of the benefit of earlier services rendered by petitioner at Ahwa Dangs from 1985 to 1996.

5. In light of these facts, question for consideration of this Court is, whether the respondents are right and whether the respondents are justified in ignoring the earlier period of service rendered by the petitioner at Ahwa Dangs from 1985 to 1996 for granting higher grade benefit to the petitioner?

6. In this matter, respondent no.3 has filed affidavit in reply. Relevant paragraph 4 and 5 of the said affidavit in reply filed by respondent NO.3 are reproduced as under :

> “4. I further say that admittedly, the petitioner had absented himself from his duties for a continuous period of more than four year i.e. From 16.4.1992 to 6.8.1996 withuot getting any kind of leave sanctioned by the competent authority and therefore this period was treated as period of leave without pay and the period in excess of three year was considered as period which will not be considered as service while computing his pensionary benefit. I say that an order in that behalf was passed by the respondent State, copy of which is produced at Annexure B to the petition.
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> 5. I further say that pursuant to the recommendations made by the Central Pay Commission, the Government of Gujarat had also decided to revise the pay scales of its employees and the employees of

the Panchayats; and, in that behalf, the respondent State had passed a Resolution dated 16.8.1994, copy of which is produced at Annexure C to the petition. I say that as provided in Clause 3(10) of the said resolution, the period which is treated as leave without pay cannot be considered for the purpose of increment and as such this period is not to be taken into consideration while granting higher pay to the concerned employee. I say that while the petitioner was working in Dangs District from 1985 to 1992, he had not completed qualified service of nien years so as to become eligible for grant of higher pay scale and, therefore, he is not entitled to the higher pay scale as per the provisions of the aforesaid Government Resolutuion.”

7. Respondent No.1 has also filed its affidavit in reply in this matter. In para 4 thereof, it has averred as under:

“4. I say that the petitioner has

challenged the legality and validity of the Government Resolution GAD dated 15th July, 2004 which inter alia provided that in cases relating to inter district transfer for giving benefit of higher pay scale, the services rendered in erstwhile (previous district panchayat) will not be considered for taking into account the aggregate service for giving benefit of higher pay scale as the circular could not and cannot override the statutory provisions of rule 3 and 4 of Gujarat Panchayats Service (Transfer of Services0 Rules, 1995 and, therefore, the said resolution which is in absolute violation of aforesaid statutory rules. Therefore, the petitioner has prayed to quash and set aside the said resolution. I deny that the State Government has decided that for considering/giving benefit of higher pay scale the services rendered in erstwhile district will not be counted. I submit

that the State Government vide resolution dated 15th July, 2004 has resolved that in case of the employees who are appointed by inter district transfer as per their own request and who have obtained the benefit of higher pay scale as per GR dated 16th August, 1994 such benefit should be extended in such case but their services are to be repatriated to their own district from which they are transferred to present district so as to redress the grievances of the senior employees of the inter district transfer and that would be in the public as well as administrative interest. It is also provided in the said GR that the employees who are appointed by inter district transfer at their own request and those who desire to get the benefit of higher pay scale, on completion of nine years in the cadre, they should be given the benefit of higher pay scale only after transferring them in their own

district. “

8. I have considered the averments made respondents in their affidavit in reply referred to above. I have also considered the order passed by respondent no. 1 dated 8.5.1998 wherein it is made clear that the petitioner has worked with the District Panchayat Dang with effect from 7.11.1985 and one incident occurred on 12.2.1992 and ultimately because of the dangerous situation, one application dated dated 15.6.1992 was made by the petitioner with request to transfer him from said District Panchayat and he had remained continuously absent from 16.4.92 and pursuant to his transfer to Bharuch District, he was relieved on 6.8.96. From said order, it also appears that the District Development Officer has made proposal for regularizing the unauthorized absence of the petitioner from 16.4.92 to 6.8.1996 and after careful consideration of the said proposal, it was

ordered that the period from 13.2.1992 to 15.4.92, leave was sanctioned and period from 16.4.92 to 6.8.96 be treated as leave without pay and the period of leave without pay in excess of three years shall not be considered as pensionable services. Thus, from perusal of the said order, it appears that the State Government has sanctioned leave from 13.2.92 to 15.4.92 and 16.4.92 to 6.8.96 as leave witout pay and thereafter, whatever period beyond three years without pay cannot be considered to be service for the purpose of pension and, thus, by said order, the State Government has regularized unauthorized absence of the petitioner by granting leave without pay for entire period from 16.4.92 to 6.8.96 as stated above with clarification that the period in excess of three years shall not be counted as pensionable service. In that order, there is no direction issued by the State Government that his earlier service should not have to be taken into

account for the benefit of higher grade as contended by Respondent No. 3 in their reply relying upon Item No. 3(10) of GR dated 16.8.94.

9. Considering the submissions made by the learned Advocates for the parties and the factual aspects as well as the documents on record, I fail to understand the stand taken by the respondents NO. 1 and 3 in their affidavit in reply wherein mere technical contentions have been raised. Both the respondents have relied upon GR dated 15.7.2004 and 16.8.1994 and have contended that the petitioner is not entitled for such benefit of higher grade. According to my opinion, respondents being the State Authorities, are well aware about the various decisions given by this court as well as the apex court on the same subject matter wherein it has time and again been laid down by this Court as well as the Hon'ble apex court that the services rendered by employee prior to

voluntary transfer or request transfer should have to be taken into account for granting higher grade benefit. Though respondent authorities are well aware of such decisions, are raising such technical contentions. In view of that, the contention raised by the respondents no. 1 and 3 that in such circumstances, if petitioner wants benefit of earlier services rendered by him, then, he shall have to repatriate to his parent district for taking benefit of higher grade, and otherwise, he is not entitled to claim benefit of said period, cannot be accepted by this court and same is, therefore, rejected.

10.This aspect has recently been examimned by this Court in Shobhaben Bharatbhai Gupta versus State of Gujarat (Special Civil Application No. 19977 of 2005) decided on 6.12.2006. In para 4 and 5 of said decision, this court has observed as

under:

"4. Learned advocate Mr. Gadhvi submitted that he relied upon one decision of this Court (Coram : Akil Kureshi, J.) passed in Special Civil Application No.819 of 1993 dated 13th September 2004, wherein, identical question has been examined by this Court, wherein, earlier service prior to the transfer was not taken into account for calculating the nine years benefit, this Court has directed the respondent – State Government to consider the entire service including the service prior to the transfer and grant the benefit of higher grade. The same aspect has been examined by this Court in case of ***Mulchand Lavjibhai Patel v. State of Gujarat*** reported in ***2003(1) G.L.H. 188 (Coram : Hon'ble Mr. Justice Y.B. Bhatt).*** The Apex Court has also examined the same aspect in case of ***Union of India and Another v. V.N. Bhatt*** reported in ***2003 (8) SCC***

714.

5. I have considered the decision given by this Court dated 13th September 2004 as referred above, wherein, aforesaid decision of Apex Court reported in 2003(8) SCC 714, 1998(5) SC 305 and 1994 (1) SCC 373 have been considered. Therefore, the relevant observations made by this Court in aforesaid decision by this Court (Coram : Hon'ble Mr. Justice Akil Kureshi), the relevant para 4 and 5 are quoted as under :

"4. The issue involved in the present petition is no longer possible for a debate. In the decision of the Honourable Supreme Court in UNION OF INDIA AND ANOTHER V. V.N.BHATT reported in (2003) 8 Supreme Court Cases 714, the Honourable Supreme Court was pleased to hold that even on voluntary transfer where the employee would lose his seniority, he would not lose other benefits

and cannot be deprived of his experience and eligibility for promotion and for the purpose of time bound promotion scheme, the petitioner would retain his experience of the previous service. Similar view was also taken by the Honourable the Supreme Court in the decisions of SCIENTIFIC ADVISOR TO RAKSHA MANTRI AND ANOTHER v. V.M.JOSEPH reported in (1998) 5 Supreme Court Cases 305 and RENU MULLICK (SMT) v. UNION OF INDIA AND ANOTHER reported in (1994) 1 Supreme Court Cases 373, Learned Counsel for the petitioner also relies on a decision of the learned Single Judge of this High Court dated 10th September, 1999 passed in Special Civil Application No.5403 of 1996.

5. On the basis of the above judicial decisions and the ratio laid down therein, I have no hesitation in coming to the conclusion that the petitioner was entitled to receive the higher pay scale pursuant to the

Government Resolution dated 5th July, 1991 despite his transfer at his request to Banaskantha District as the petitioner is entitled to retain his past experience to reckon requisite nine years of service for the purpose of grant *of higher pay scale upon stagnation for the above period.“*

11.This aspect has also been considered in detail by this Court (Coram : Hon'ble Mr. Justice R. Balia,J.) in Ajitsinh Chaturji Rathod v. State of Gujarat & Ors., reported in 2000 (4) GLR 3181. Relevant paragraph 4, 5 and 7 of said decision are reproduced as under:

“4. The relevant clause of the resolution dated 16th August 1994 governing the transfer controversy reads as under :-

3.2 The First H.G.S. shall be granted to the employee who has completed 9 years of service in the respective cadre and pay scale provided that the said employee should not have got more than two promotions prior to this. For the purpose of granting the Higher Grade Scale 9 years service in respective pay scale means the regular service being taken into account for the purpose of seniority of employees recruited by approved method and rendered in the one and same cadre and grade shall be taken into consideration. However, the services of isolated cadres encadred in other cadres without the request of employee and the earlier service of isolated cadre which may be encadres hereafter or cadres whose pay scale is equal but nomenclature is changed may be taken into consideration for sanctioning the Higher Grade Scale. Similarly, in individual cases also, if the Government has made transfer

from one cadre to other for public interest and pay scales of these posts are equal, the services rendered in both the cadres shall be taken into account for the scheme of Higher Grade Scale subject to the other conditions. For this purpose, the office concerned shall issue the certificate to the effect that the cadre of respective employee is changed for public interest."

The key words in the clause are, " For the purpose of granting the Higher Grade Scale 9 years service in respective pay scale means the regular service being taken into account for the purpose of seniority of employees recruited by approved method and rendered in the one and same cadre and grade shall be taken into consideration."

This clause gives a clear indication that whatever period is to be taken into account for the purpose of counting the seniority of the employee in the cadre is to be counted for the purpose of this scheme as well. There is no dispute, and there cannot be that the basic ingredients of seniority is continuous officiation on the post with effect from the date of a regular appointment unless rules otherwise provide. It is not the case of either of the parties that other than this rule would govern the question determining the seniority of the petitioner vis-a-vis other employees in the cadre. if that has to be taken, then the starting point of period which is to be taken into account for the purpose of seniority commences with effect from 27th May 1964 and 9 years are completed on 27th May 1973 which justifies the order made earlier. However, it is contended by the learned AGP that since the petitioner was transferred at his own request from District Panchayat, Surat to District Panchayat, Mehsana, he has been placed at the bottom in seniority list amongst the persons in the cadre employed in the District Panchayat, Mehsana on the date of transfer and therefore, for the purpose of seniority of the petitioner, his services prior to his transfer to District Panchayat, Mehsana are not to be taken into account for the purpose of determining the seniority in the District Panchayat, Mehsana as the period prior to his transfer to District Panchayat, Mehsana is not to be counted for seniority in consonance with the clause 3.2 of the resolution dated 16th August 1994 which modified the earlier resolution of 1991 for the purpose of granting the higher grade scale on completion of 9 years of service has to be reckoned with effect from 1st March 1981 only which the petitioner completes on 1st March 1990. Therefore, the impugned order recalling the earlier fixation of higher grade scale with effect from 1st June 1987 has rightly been recalled and the petitioner has been given benefit with effect from 1st March 1990 on completion of 9 years on that date.

5. Having considered the carefully the rival contentions, I am of the opinion that there is no warrant

to draw this inference that the petitioner has lost his services from 1964 for the purpose of reckoning seniority in the present cadre. At the relevant time, when the petitioner was recruited, the Gujarat Panchayat Act, 1961 was in force. Chapter XI of the Act of 1961 contains the provisions relating to services of Panchayat. Section 203 envisages that for the purposes of bringing about the discharge of functions and duties of Panchayats, a Panchayat services shall be constituted in connection with the affairs of the Panchayat in pursuance thereof, the panchayat service was constituted. The provisions further envisage that the panchayat service was constituted of such classes, cadres, and posts and initial strength of officers and servants in each such class and cadre as the State Government may from time to time determine and such cadres may consists of District Cadres, Taluka Cadres and Local Cadres. It also envisages that that, subject to the provisions of the Act, the State Government may make Rules regulating the mode of recruitment and providing conditions of services, appointing to the panchayat services also for providing inter district transfer of service belonging to panchayat service and the circumstances on which and the conditions on which such transfers shall be made. Gujarat Panchayat Service [Transfer of Service] Rules 1968 governs the inter district transfers. The Rule 3 provide the conditions under which mode, the transfers can be made, [i] in the public interest; [ii] in order to absorb the members becoming surplus in one District or [iii] an application is made to the District Development Officer in that behalf by the incumbent. As a condition of such transfer, Rule 4 provides, that in the case of transfer, by way of absorption of a surplus employee of another district or at one's own request, such incumbent shall not claim seniority over the person who ranks last in the post having clear vacancy in the cadre to which such member may be appointed. As a result of such transfer, he takes seniority at the bottom amongst the regularly employed persons in the cadre at the place of transfer on the date of transfer. However, this does not envisage that the period of service for the purpose of seniority in all circumstances to be reckoned with effect from the date of transfer. That is to say, the period of past services in the parent district, he carries with him for the purpose of reckoning the seniority vis-a-vis a person appointed to the services of the district who comes after him. Therefore, it is not possible to accept the contention of the learned counsel for the respondents that, because of the operation of condition of inter district transfer on request, the petitioner is not entitled to compute the period of services rendered at District Panchayat, Surat for the purpose of counting seniority. The limited operation to which the rules provide affecting the seniority is vis-a-vis persons already in the employment at the time of transfer on request or at the time of absorption on being declared surplus in the parent district. He loses seniority not because of not reckoning the period of past services rendered in parent district, but because of securing transfer on request as a condition for acceptance of such

request.

7. However, the question does not rest here. It is not envisaged anywhere that any part of the services is not to be treated for the purpose of conferring benefit of the higher grade scale, if the person is otherwise entitled to it without clubbing of the periods. The Scheme does not express its applicability only to same cadre and grade, but applies to `one and same cadre and grade'. The use of expression `one and same cadre' must be interpreted in the context of object of scheme viz. to provide time bound promotion at least once on completion of a period of service, since regular appointment. If that period is completed in any one cadre, without aid of clubbing, there is nothing in the Scheme which can inhibit the incumbent from availing such benefit with effect from that date. If the incumbent has completed continuous regular service of requisite period, to be accounted for in that cadre, in more than two cadres of same grade, the benefit must go to the incumbent on the earlier of the two dates. Scheme has clear object of giving one promotional chance, in case actual promotion has not come one's way, on completion of nine years service in one and the same cadre after regular appointment. The question of continuous service for seniority in inextricably woven with the thread of granting promotion to incumbent atleast once on completion of nine years of regular service in one cadre to combat stagnancy. The question of taking into account aggregated period as to any two cadres will arise only in case where the services in one cadre does not satisfy the condition of requisite period of service in that cadre. However, if a person qualifies for that benefit, remaining in one and the same cadre at particular point of time, merely because of the exigencies of service later in time the incumbent has been placed in different cadre, he cannot be deprived of that benefit by confining the question of extending benefit only to the computation of period to his present cadre. What is requisite condition is that he should have spent 9 years of regular service which is accountable for the purpose of seniority in one and the same cadre and grade, not necessarily in the present cadre. If a man has served in one district cadre for 4 years and has been transferred to another district cadre at his own request and he has served there for six years, in that event in either of the cadre, he has not completed 9 years service and he cannot take advantage unless the both are clubbed together. In the other case, a person may have served in one cadre for more than 20 years and has been transferred to another cadre by loss of seniority. In such case, he is not deprived of the benefit of the scheme which has to operate from the date of entry in the service at different points when the conditions can be said to be fulfilled. In that event if a person has fulfilled the conditions for availing the benefit at any point, be it before his services are transferred in the present cadre affecting his seniority, there is no provision in the scheme which takes away that benefit because of the subsequent events. This is also in consonance with the

object with which the scheme has been introduced."

12. Therefore, in view of the observations made by the Hon'ble Apex Court as well as this Court in number of decisions deciding identical question that on request transfer, employee is not losing length of service for the purpose of higher grade benefit, there may be adverse effect on the seniority or promotion right but for grant of higher grade benefit, only requirement is that the employee concerned must have rendered nine years continuous service in one scale and one post (cadre) and in between, no promotion. Petitioner is satisfying this criteria. Petitioner remained in service from 7.11.85 to 6.8.1996 in District Panchayat, Ahwa Dangs in one scale, one post (cadre) and was not promoted in between though he remained absent from duty for the period as aforesaid but ultimately, said period was regularized by order dated 8.5.1998. Therefore, decision which has been taken by respondent NO.1 and 2 for not granting higher grade benefit while considering earlier service rendered by him in District Panchayat,Ahwa Dangs is illegal and contrary to GR dated 16.8.94 and 15.7.2004.

13. In view of the above discussion and observations made by this court and also in view of the decisions of this court and apex court refered to above, decision of respondent NO.1 dated 12.12.2005 is required to be set aside by directing respondents no.1 to 3 to consider the service continuous with effect from 7.11.1985 till this date without any break as the unauthorized absence from duty has been regularized by the State Government by order dated 8.5.1998 and grant benefit of higher grade as available under GR dated 16.8.1994 to the petitioner within the period of two months from the date of receipt of copy of this order and to make necessary payments to the petitioner as a consequence thereof within three months from the date of passing orders in favour of petitioner.

14. Accordingly, order of respondent no.1 dated 12.12.2005 is set aside. Respondents no.1 to 3are directed to consider the service continuous with effect from 7.11.1985 till this date without any break and grant benefit of higher grade as available under GR dated 16.8.1994 to the petitioner within the period of two months from the date of receipt of copy of this order and to make necessary payments to

the petitioner as a consequence thereof within three months from the date of passing orders in favour of petitioner. Rule is made absolute in terms indicated hereinabove with no order as to costs.

(H.K. Rathod,J.)

Vyas